

No. 9561

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT //

FIRST PRESBYTERIAN CHURCH OF SANTA BARBARA,
CALIFORNIA, a religious corporation,

Appellant,

vs.

M. L. RABBITT, as Trustee in Bankruptcy of the Bank-
rupt Estate of James Marwick, and JAMES MARWICK,

Respondents and Appellees.

MEMORANDUM IN REPLY TO PETITION FOR REHEARING.

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Introduction.

Appellant takes the position that appellee presents no reasonable basis for a reconsideration of the opinion of the court in his petition for a rehearing.

The Points and Principles Upon Which the Appeal Was Determined Were Raised by the Appellant.

I.

The statement by the appellee of the grounds of appeal stated by appellant as the basis for the preparation of the record answers the contention of appellee that a new ground constituted the basis for the court's opinion. The court in its opinion made the determination that there was consideration for the transfer; that the transfer occurred prior to the incurrence of the obligations of the transferor and that the transfer was valid; the court further defining appellant's rights under the transfer.

Appellant takes exception to the inference raised in appellee's petition that there were stipulations made during the trial which are not contained in the transcript. This is not the case. It is the positive assertion on the part of counsel for the appellant that every stipulation made during the course of the trial is contained in the transcript. Some stipulations were made after submission in the lower court, but they are also contained in the record on appeal. What counsel means by discussions we are at a loss to understand; we are not aware that a court does or may base its decision upon discussions as contrasted with stipulations or agreements in open court. It may further be pointed out that counsel does not in any way intimate what "discussions" or stipulations were omitted, or in what way these omissions he contends exist affect the case.

II.

Under point “II” in the petition of appellee, he attempts to reargue the question of consideration again upon this petition. The argument has been previously made before this court, and has been determined against appellee. We do not feel that we should burden the court with a re-argument of the question to which it has given careful consideration and upon which it has rendered its opinion.

III.

The third point set up in the petition presents a rather surprising contradiction. In the second point, appellee asserts that the so-called declaration of trust has been before the court from the inception of the determination of the issues involved in the case, being set up verbatim in the answer with an allegation that it constituted a prior transfer to the one sought to be avoided; then, in point three, appellee attempts to assert that the document is not before the court, and that the appellate court erred in interpreting it. Certainly a defendant is as much entitled to an adjudication of his rights in and to a piece of property as is a plaintiff, where he sets out his rights in his answer and asks that they be adjudicated. The opinion of this court does not state that the document was not before the court; the court said, “Its validity is not challenged by pleading or by proof.” Appellee is the party who wishes now to raise new points on appeal, and at such a time as this the attempt must of necessity be futile.

IV.

We have examined the authorities cited by appellee and, while we have no quarrel with the holdings of the cases, we fail to see anything in them that is contrary to the opinion of this court in the instant case.

Conclusion.

Appellant urges that no reasonable basis for a rehearing of this matter has even been suggested by the appellee and that the petition should be denied.

Respectfully submitted,

SCHAUER, RYON & McMAHON,
ROBERT W. McINTYRE,

Attorneys for Appellant.